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No. 87-1786

IN THE

SUPREME COURT OF THE UNITED STATES

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRUST BOARD,

Petitioner,

vs.

LINDA ELDREDGE, individually, and on behalf of all others similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari (hereinafter, "Petition") which seeks review of the Opinion of the United States Court of Appeals for the Ninth Circuit reported at 833 F.2d 1334 (9th Cir. 1987).

OPINION BELOW

The opinions below appear at 449 F.Supp. 506 (N.D. Cal. 1977), 83 F.R.D. 136 (N.D. Cal. 1979), rev'd. 662 F.2d 534 (9th Cir. 1981), cert. denied, 459 U.S. 917 (1982), and 833 F.2d 1334 (9th Cir. 1987).

STATEMENT OF THE CASE

In 1975 Respondent Linda Eldredge filed suit under Title VII of the Civil Rights Act of 1964 against Petitioner Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee and Trust Board (hereinafter, "Petitioner" or "JATC"), alleging that the JATC maintained entrance requirements to its carpentry apprenticeship program that discriminated against women on the basis of sex.

The JATC is a joint labor management committee that was created to administer the apprenticeship program for the carpentry trade in the forty-six northern California counties. The JATC is an independent legal entity created by a Trust Agreement. The Trust Agreement grants full authority to the JATC to structure the carpentry apprenticeship program and to select apprentices. See A-2 of Appendix to Petition, 833 F.2d at 1335.

Since 1975, the JATC has established and maintained uniform admission requirements and procedures for its apprenticeship and training program. Beginning in August, 1975 the JATC plan required an applicant for its carpentry apprenticeship program (1) to have passed his or her seventeenth birthday; (2) to have a high school diploma or G.E.D. equivalent; (3) to obtain a listing on one of the JATC's new applicant referral lists[1] and (4) to obtain a commitment of employment from

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[1] Originally, an individual could only obtain a listing on a JATC new applicant referral list during a specified, limited period of time when the JATC's program was open to new applicants. In November, 1976, the JATC's admission plan was amended so that at any time any applicant who met the age and education requirements could obtain a listing on a JATC new applicant referral list.

an employer who subscribed to the JATC's apprenticeship program (i.e., from a union contractor). No prior carpentry experience or training is required. See A-2 - A-3 of Appendix to Petition, 833 F.2d at 1335, and n. 6 at A-20 of Appendix to Petition, 833 F.2d at 1339, n. 6.

The JATC authorized two methods for an applicant to obtain the requisite commitment of employment. Under one method a contractor may request the carpenters' union to provide a beginning apprentice, but not a particular named individual. The carpenters' union then dispatches an applicant apprentice by obtaining from the JATC the name of the new applicant apprentice that appears at the top of the JATC new applicant referral list. Very few applicants obtained work through this method. Under the second authorized method to secure employment an applicant is permitted to find an employer willing to provide the applicant with a job and to request that applicant by name from the carpenters' union. This method, known in the industry as the "hunting license" system, is the one through which the vast majority of indentured apprentices obtained their first jobs and gained admission to Petitioner's carpentry apprenticeship program. See A-3 of Appendix to Petition, 833 F.2d at 1335-36. Although a newly indentured apprentice may lose his or her requisite first job within one day of gaining admission to the program, the job loss does not affect his or her apprenticeship status. Once an applicant becomes an indentured apprentice he or she is eligible for future job referrals through the union out-of-work apprentice list. See n. 9 at A-27 of Appendix to Petition, 833 F.2d at 1340, n. 9.

For the years 1976 through 1984, 20.9% of the female applicants and 38.8% of the male applicants to the JATC's program became indentured apprentices. The female admission rate was about 54% of the male admission rate. See n.7 at A-21 of Appendix to Petition, 833 F.2d at 1339, n. 7.

In 1975 Respondent Linda Eldredge applied to the JATC's program. She met that JATC's age and educational requirements and obtained the requisite listing on a JATC new applicant referral list. She was unable to secure a job with a union contractor and, as a result, was never indentured into the JATC apprenticeship program. In 1977 Respondent Eldredge filed an amended complaint alleging that the "hunting license" system has a disparate impact on the admission of women to the JATC's program and that it was a violation of Title VII. In 1979 the district court dismissed the case under Rule 19, Federal Rules of Civil Procedure, for the failure to join the 4,500 potential employers of apprentices as defendants. Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee and Trust Board, 440 F.Supp. 506 (N.D. Cal. 1977) and 83 F.R.D. 136 (N.D. Cal. 1979). The decision was reversed and the case was remanded at 662 F.2d 534 (9th Cir. 1981), cert. denied, 459 U.S. 917 (1982).

On remand, the plaintiff class was certified. The case was bifurcated for trial. Shortly before the liability trial was to begin both sides moved for summary judgment. The Petitioner's motion for summary judgment was granted. The Respondents' motion for summary judgment on the question of JATC liability was denied. See

Appendix C to Petition. The Ninth Circuit reversed and ordered the district court to enter summary judgment for the Respondents' class on the issue of Title VII liability based on the JATC's use of the hunting license system and the Ninth Circuit remanded the case for trial to determine the appropriate remedy.

REASONS FOR DENYING WRIT

Introduction

The Petition should be denied because it does not seek review of any issue which is in conflict among the Courts of Appeals, because it presents no novel, significant legal issue and because this case turns on its own facts.

A. PETITIONER'S ENTRANCE REQUIREMENT VIOLATES TITLE VII BECAUSE IT HAS A DISPARATE IMPACT ON THE ADMISSION OF WOMEN TO PETITIONER'S APPRENTICESHIP PROGRAM; ELIMINATION OF THE DISCRIMINATORY ENTRANCE REQUIREMENT WILL AFFORD RELIEF TO RESPONDENTS' CLASS

The Ninth Circuit Court of Appeals found Petitioner liable under Title VII for maintaining an entrance requirement that has a significant disparate impact on the admission of women to Petitioner's carpentry apprenticeship program. The Court found that Petitioner had not justified its reliance on the entrance requirement as a "business necessity" and, additionally, that alternatives existed which would satisfy the alleged purposes of the challenged entrance requirement.

Petitioner's argument that the decision "calls for an unwarranted extension of liability under Title VII" (Petition, page 9) ignores both the language of the statute and the case-law of this Court interpreting it.

42 U.S.C. Section 2000e-2(d) provides, in pertinent part, that:

> It shall be an unlawful practice for any . . . joint labor-management committee controlling apprenticeship or other training . . . to discriminate against any individual because of . . . sex . . . in admission to . . . any program established to provide apprenticeship or other training.

The entrance requirement at issue here violated Title VII because it is a "facially neutral employment practice" that has a "significantly disproportionate impact" on a group protected by Title VII. Connecticut v. Teal, 457 U.S. 440, 446 (1982), Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Simple elimination of the discriminatory entrance requirement[2/] will afford the primary relief Respondents seek. Petitioner's argument that the disparate impact of its entrance requirement is the result of sex discrimination practiced by employers finds no evidentiary support in the record. Moreover, the reason that a facially neutral practice has a disparate impact is not

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[2/] The "facially neutral practice" at issue here is the requirement that applicants secure a job with a union contractor in order to gain admission to Petitioner's apprenticeship program and, more specifically at issue, is the Petitioner's reliance on the "hunting license" system as a means for applicants to secure their first jobs. Under that system applicants may seek out employers on their own who will agree to hire them.

In fact, Petitioner has maintained an alternative to the hunting license system for applicants to secure the requisite first job. Under the alternative system applicants are referred anonymously to union contractors from the Petitioner's new applicant referral lists. According to Petitioner, the requirement that an applicant secure a job before Petitioner will indenture him or her is in place to increase the chances that indentured apprentices will have on-the-job carpentry training while receiving Petitioner's carpentry classroom instruction. Petitioner's alternative anonymous referral system can serve this purpose.

relevant to determining Title VII liability, unless the reason is pertinent to establishing a business necessity defense. Petitioner herein failed entirely to justify as a business necessity its reliance on the hunting license system as a means of screening applicants. See Appendix, A-26 - A-36, to Petition, 833 F.2d at 1340-41.

Although Petitioner had the opportunity to do so in connection with presenting a business necessity defense, it introduced no evidence whatsoever that any employer or employers had in the past or planned in the future to discriminate against women apprentices in hiring. Petitioner's argument that sex discrimination on the part of employers caused the disparate impact of the hunting license system and that such presumed employer sex discrimination would doom to failure any alternative entrance requirement is devoid of any evidentiary basis.[3/]

On remand discovery will ensue on the question of appropriate relief for Respondents' class. At the trial on relief for the class Petitioner will have the opportunity and the duty to present any evidence it has that any particular alternative or alternatives to the hunting license system are not feasible.

[3/] It may be that the disparate impact of the hunting license system is the result of intentional sex discrimination practiced by the JATC. Perhaps Petitioner provides a proportionately higher number of male applicants than female applicants with information about employers that are in the process of hiring applicant apprentices. Or, it may be that male applicants, through their jobs and social contacts, have better connections to union contractors than do female applicants. These possible explanations for the disparate impact, like the one offered by Petitioner, are mere speculations.

B. A SIGNIFICANT DISPARITY BETWEEN THE INDENTURE RATES OF MALE AND FEMALE APPLICANTS TO PETITIONER'S PROGRAM ESTABLISHED A PRIMA FACIE CASE OF SEX DISCRIMINATION

The Court of Appeals found that a significant disparity existed between the indenture rates of male and female applicants to Petitioner's program and that it was the hunting license sytem that caused the disparity. See A-19 of Appendix to Petition, 833 F.2d at 1338. The male and female applicant and indenture figures were supplied by Petitioner. The rates show that between 1976 and 1984 there were 54,344 male applicants and 3,140 female applicants to Petitioner's program. Of the male applicants 21,066 or 38.8% were indentured while of the female applicants only 657 or 20.9% were indentured. The female indenture rate was 54% of the male indenture rate. See A-20 - A-21 of Appendix to Petition, 833 F.2d at 1339.

The Ninth Circuit found that the hunting license had a disparate impact on women by following the EEOC guidelines on adverse impact which have been recognized by this Court in Connecticut v. Teal, supra, 457 U.S., n. 4 at 443. See A-21 - A-23 of Appendix to Petition, 833 F.2d at 1339.

Petitioner implies erroneously that the Ninth Circuit had compared women's indenture rates into its apprenticeship program with "the percentage of females as opposed to males in the society at large." Page 12 of Petition. This is simply not true. Having misread and, as a result, misrepresented the Ninth Circuit opinion in this case, Petitioner inappropriately relied on the case of Janowiak v. City of South Bend, 836 F.2d

1034 (7th Cir. 1987) at pages 13 - 14 of Petition. The Janowiak decision considers an issue not involved in the instant case. That issue is whether conditions existed in the City of South Bend which justified the City's voluntary adoption of an affirmative action plan. The Court found such conditions were not present and that South Bend, before implementing its plan, had not made the appropriate "statistical comparison that focuses on the relevant qualified area labor pool . . .." Id., 836 F.2d at 1039.[4/]

Unlike in Janowiak, the Ninth Circuit in this case follows conservatively the dictates of this Court. See Hazelwood School District v. United States, 433 U.S. 299, 308-09, and n. 13 at 308 (1977) and International Brotherhood of Teamsters v. United States, 431 U.S. 324, 337-38, n. 17 (1977). Although the qualifications for entrance into Petitioner's apprenticeship program are minimal (Petitioner requires applicants to be at least seventeen years of age and to have a high school diploma or G.E.D. equivalent) and are qualifications held by vast members of the general population, the statistical comparisons in this case were based on a labor pool limited to the actual applicants who met Pecitioner's age and educational requirements. In fact there is no more limited appropriate labor pool and Petitioner has never defined one that would be more appropriate.

[4/] That Petitioner has even alluded in any Court below to the argument it makes to this Court that Respondents' statistics were based on an incorrect labor pool is, at best, highly questionable.

C. PETITIONER'S ARGUMENTS CONCERNING POTENTIAL DIFFICULTIES IN DETERMINING APPROPRIATE RELIEF FOR INDIVIDUAL CLASS MEMBERS ARE PREMATURE AND WERE NOT RAISED IN ANY COURT BELOW

Arguments in the Petition concerning potential difficulties in ascertaining appropriate relief for individual class members were not made in any Court below and are premature. Such matters will be taken up by the district court when the trial on classwide relief occurs.

CONCLUSION

For all the foregoing reasons Respondents respectfully request that the Petition be denied.

Dated: May 20, 1988

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 23rd day of May, 1988, four copies of Respondents' Brief In Opposition to Petition for Certiorari were mailed, postage fully prepaid, to Moore, Sizoo & Cantwell, 1111 Civic Drive, Walnut Creek, CA 94596, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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